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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ANTONIO JACKSON, Private,
United States Army, Petitioner

v.

THE UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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QUESTION PRESENTED

WHETHER MILITARY RULE OF EVIDENCE 313(b), WHICH PERMITS THE ADMITTANCE AT A CRIMINAL TRIAL OF EVIDENCE OBTAINED IN THE COURSE OF AN ADMINISTRATIVE INSPECTION, VIOLATES THE FOURTH AMENDMENT WHERE AN ENUNCIATED PURPOSE OF THE INSPECTION WAS A SEARCH FOR CRIMINAL EVIDENCE, AND THE AREAS SEARCHED WERE LIVING QUARTERS IN WHICH SERVICE MEMBERS HAD REASONABLE EXPECTATIONS OF PRIVACY.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ANTONIO JACKSON, PRIVATE,
United States Army, Petitioner

v.

THE UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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Petitioner, Antonio Jackson, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 48 M.J. 292 (1998) (Appendix A). The decision of the United States Army Court of Criminal Appeals is unpublished (Appendix B).

JURISDICTION

The judgment for the Court of Appeals for the Armed Forces was entered on September 18, 1998 (Appendix C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1259(3); the United States Court of Appeals for the Armed

Forces having reviewed this case pursuant to Uniform Code of Military Justice article 67(a)(3), 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves:

1. The Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 313 [Inspections and inventories in the Armed Forces], which provides in pertinent part:

> (a) *General Rule.* Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.
>
> (b) *Inspections.* An "inspection" is an examination of the whole or part of a unit . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit . . . An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness,

> sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. . . An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit . . . and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subject to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion . . . Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

STATEMENT OF THE CASE

Procedural History:

On May 26 and June 17, 1994, Private E2 Antonio Jackson was tried by a general court-martial composed of officer and enlisted members at Fort Hood, Texas. Contrary to his pleas, Private Jackson was found guilty of wrongful possession of marijuana and unlawfully carrying a concealed weapon, in violation of Uniform Code of Military Justice, articles

112a and 134, 10 U.S.C. §§ 912a and 934 (1988), respectively. Private Jackson was sentenced to confinement for four years, forfeiture of all pay and allowances, reduction to Private E1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On July 18, 1996, the Army Court of Criminal Appeals affirmed the findings of guilty and sentence in an unpublished opinion (Appendix B). On May 28, 1997, the United States Court of Appeals for the Armed Forces granted Private Jackson's Petition for Grant of Review and specified the following issue:

> WHETHER THE MILITARY JUDGE ERRED WHEN HE RULED THAT THE GOVERNMENT HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT THE SEARCH OF APPELLANT'S BARRACKS ROOM WAS A VALID HEALTH AND WELFARE INSPECTION AND THAT THE SEARCH WAS LAWFUL BECAUSE APPELLANT HAD NO REASONABLE EXPECTATION OF PRIVACY IN HIS BARRACKS ROOM.

The Court of Appeals for the Armed Forces rendered its opinion on September 2, 1998 (Appendix A) and entered judgment on September 18, 1998, affirming the findings and sentence of the lower military court (Appendix C).

Statement of Facts:

A summary of the facts adopted by the Court of Appeals for the Armed Forces is as follows:

> On January 26, 1994, appellant's unit commander, Captain (CPT) Lamport, was informed by Criminal Investigation Command (CID) Special Agent (SA) Foster that an anonymous female friend

of appellant had reported that she had witnessed appellant selling drugs in his barracks room the previous evening. The woman also had said that appellant hid the drugs in a stereo speaker in his room.

This information raised two separate concerns. First, that a member of CPT Lamport's unit might have committed a crime in the barracks. Second, that as a result of this activity, illegal drugs may have been distributed to others within the barracks, thereby undermining the military readiness of the unit. Although CPT Lamport—after consulting with the battalion's legal adviser—concluded that the information was not sufficiently reliable to authorize a probable cause search of appellant's room under Mil.R.Evid. 314, he determined that the information about distribution of drugs in the barracks was sufficient to raise concerns about the readiness of the unit.

As a result of these concerns, CPT Lamport ordered a health and welfare inspection "to find out on a whole what the unit was like for drugs and if anybody else had been using" drugs. CPT Lamport contacted the local canine unit, had a dog handler prove the reliability of the dog's drug sniffing capability, and posted non-commissioned officers (NCOs) as guards at all entrances and exits to prevent the removal of evidence. All 36 barracks rooms assigned to members of CPT Lamport's unit were inspected, and CPT Lamport told the inspector to "look at every room" and not to focus on any particular room.

The health and welfare inspection took place about "an hour to an hour and a half after" SA

> Foster told CPT Lamport about the anonymous tip. The inspection was carried out by two canine units (dogs and handlers), SA Foster (accompanying the canine team chief) and "numerous NCOs."
>
> After one of the drug dogs alerted in appellant's room, SA Foster, who was standing by in case any drugs were found, entered the room to help the canine team. The dog handler opened a stereo speaker and discovered a small bag, which he suspected contained marijuana. SA Foster conducted a field test of the substance and confirmed that it was marijuana. The record does not reflect whether SA Foster departed the barracks after he seized the marijuana or remained with the canine team until the examination of all 36 rooms was completed.

United States v. Jackson, 48 M.J. 292, 294 (1998).

At trial, the defense moved to suppress the fruits of the inspection on the grounds that it was an illegal search. In ruling on the motion to suppress, the military judge found that the primary purpose of the examination was to ensure "unit readiness." Thereafter, petitioner was convicted, *inter alia*, of wrongful possession of marijuana.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF WHETHER THE FOURTH AMENDMENT APPLIES TO THE ARMED FORCES NEEDS TO BE DEFINITIVELY ANSWERED.

This Court has never definitively answered the question of whether the Fourth Amendment applies to the armed forces. *See United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992). In most cases, this Court's silence has not substantially affected the Fourth Amendment rights of service members, given that the

Court of Appeals for the Armed Forces[1] held in 1960 that "the protections of the Bill of Rights, except those which are expressly, or by necessary implication inapplicable, are available to members of the armed forces." *United States v. Jacoby*, 11 C.M.A. 428, 29 C.M.R. 244, 246-47 (C.M.A. 1960).[2]

Additionally, Congress has codified most aspects of the Bill of Rights in the Uniform Code of Military Justice[3] (UCMJ), or, via Executive Order, in the Military Rules of Evidence or the Rules for Courts-Martial. In *Weiss v. United States*[4], this Court emphasized the deference it accords Congress insofar as the rights of service members are concerned:

> . . . [W]e have recognized in past cases that "the tests and limitations of [due process] may differ because of the military context." The difference

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[1]Formerly the United States Court of Military Appeals (COMA). Note that on October 5, 1994, the President signed into law the Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), which redesignated the COMA as the United States Court of Appeals for the Armed Forces (CAAF). *See* 10 U.S.C. § 941. For purposes of consistency, textual references to the COMA in this petition will be cited as Court of Appeals for the Armed Forces or CAAF.

[2]*Also see United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981); *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (Fourth Amendment applies with equal force in military as it does in civilian community.)

[3]*E.g.*, the right against self-incrimination, UCMJ art. 31(a)(1988); the right to rights warnings, UCMJ art. 31(b)(1988); and the right against double jeopardy, UCMJ art. 44 (1988).

[4]510 U.S. 163, 114 S.Ct. 752, 127 L.Ed. 2d 1 (1994). The decision in *Weiss* addressed two cases for which review had been jointly petitioned: *Weiss*, which concerned the legality of the appointment of the military judiciary under the Constitution's Appointments Clause; and *Hernandez v. United States*, which held that the lack of a fixed tenure by the military judiciary did not violate due process.

> arises from the fact that the Constitution contemplates that Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and Remedies related to military discipline." Judicial deference thus "is at its apogee" when reviewing Congressional decisionmaking in this area. Our deference extends to rules relating to the rights of service members: "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. . . . [W]e have adhered to this principle of deference in a variety of contexts where . . . the constitutional rights of servicemen were implicated."

Id. at 177 (citations omitted).

This deference has been predicated upon the assumption that Congress and the military would not abrogate the basic constitutional protections of service members. This assumption is not always valid, as is evident from the facts of petitioner's case. The inspection under Military Rule of Evidence 313(b) has become a judicially sanctioned vehicle for military commanders to circumvent the Fourth Amendment and search for criminal evidence when probable cause either does not exist or is inconvenient to establish. The impact of letting the Court of Appeals for the Armed Forces' decision stand in the case *sub judice* is to strip the Fourth Amendment rights from service members charged with defending and, if necessary, dying for the U.S. Constitution.[5]

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[5]"The majority opinion results in the anomalous situation where it may be unlawful to invade the privacy of one soldier unless the privacy of 100 others is invaded at the same time." *United States v. Jackson*, 48 M.J. 292, 297 (1998) (Gierke J., dissenting). In the case *sub judice*, it would have been impermissible to inspect only the petitioner. The CAAF noted in its opinion that 36 rooms were subjected to inspection. *Id.* at 295.

A. *Military inspections for unit readiness, health, and welfare are a vital and necessary exception to the Fourth Amendment probable cause requirement.*

The military inspection has traditionally been a "tool" for a commander to use in insuring "the overall fitness of [the] unit to perform its mission."[6] *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981) (quoting *United States v. Wenzel*, 7 M.J. 95, 97 (C.M.A. 1979) (Fletcher, C.J., concurring)). Unit inspections are necessary and legitimate exercises of command responsibility. *U.S. v. Thatcher*, 28 M.J. 20

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[6]The Court of Appeals for the Armed Forces has discussed, in detail, the indicia of a traditional military inspection, as compared to a generalized search:

> A military inspection is an examination or review of the person, property, and equipment of a soldier, the barracks in which he lives, the place where he works, and the material for which he is responsible. An inspection may relate to readiness, security, living conditions, personal appearance, or a combination of these and other categories. Its purpose may be to examine the clothing and appearance of individuals, the presence and condition of equipment, the state of repair and cleanliness of barracks and work areas, and the security of an area or unit. Except for the ceremonial aspect, its basis is military necessity.
>
> Among the attributes of an inspection are: that it is regularly performed; often announced in advance; usually conducted during normal duty hours; personnel of the unit are treated evenhandedly; and there is no underlying law enforcement purpose. An inspection is distinguished from a generalized search of a unit or geographic area based upon probable cause in that the latter usually arises from some known or suspected criminal conduct and usually has a law enforcement as well as a possible legitimate inspection purpose.

United States v. Hay, 3 M.J. 654, 655-56 (A.C.M.R. 1977).

(C.M.A. 1989). A "commander has the inherent power (and continuing duty) to inspect his organization, in the strict sense of the word, formally or informally, at any time, to determine its ability to perform its mission."[7] The commander has well recognized authority to inspect persons and places within his control. *United States v. Florence*, 5 C.M.R. 48, 50 (1952); *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981). "By virtue of his command status, a commander has responsibilities that others do not possess, and so he must be granted powers commensurate with that responsibility." *United States v. Kalscheuer*, 11 M.J. 373, 376 (C.M.A. 1981). The commander is responsible for overseeing the health, safety, welfare, morale, and efficiency of those under his command. *United States v. Harris*, 5 M.J. 44, 59 (C.M.A. 1978). The right of a commander to intrude upon a service member for the purpose of conducting a lawful inspection, however, does not eliminate a service member's right to privacy. *See United States v. Thatcher*, 28 M.J. 20, 23 (C.M.A. 1988).

B. *Service members have a reasonable, albeit reduced, expectation of privacy in their barracks rooms.*

The Fourth Amendment protects individuals from unreasonable searches and seizures. To be entitled to object to the admissibility of evidence obtained from a search, an accused must have a reasonable expectation of privacy in the place searched. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978). This Court has observed that the rights of service members must be conditioned to meet overriding demands of discipline and duty. *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed. 2d 439 (1974).

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[7] *United States v. Lange*, 15 C.M.A. 486, 35 C.M.R. 458 (1965), quoting from the decision of the Board of Review below. See also *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981).

Therefore, reasonable expectations of privacy for military members will differ from those in civilian society. *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981). It is axiomatic that a soldier's expectation of privacy must "take into account the exigencies of military necessity and unique conditions that may exist within the military society." *Id.*

Recently, the U.S. Navy-Marine Corps Court of Criminal Appeals observed that:

> The [Supreme] Court has thus recognized a middle ground between the home, where society most readily accepts expectations of privacy as reasonable, and open fields, where an individual may not legitimately demand privacy. A similar analysis can be applied to determine reasonable expectations of privacy in the military setting. A military barracks is not a place intended for the intimate activities associated with family privacy. It is subject to pervasive and continuing governmental regulations and controls, including periodic inspections. On the other hand, a barracks room is not completely devoid of privacy like an open field.

United States v. Curry, 46 M.J. 733 (N.M.Ct.Crim.App. 1997), *aff'd*, 48 M.J. 115 (1998), *cert. petition filed*, — U.S. — Aug. 20, 1998).

The Court of Appeals for the Armed Forces has ruled that service members have no reasonable expectation of privacy in areas subject to a "traditional military inspection". *Middleton*, 10 M.J. 123, 128 (C.M.A. 1981). The *Middleton* Court also recognized that "[t]he armed services have made increasing efforts to provide privacy for service members in their dormitories and barracks." *Id.* at 128 n.8. More recently, the CAAF astutely noted that:

> This transition from open bays to semi-private rooms evolved largely to make military life more

> palatable and, accordingly, more attractive to potential recruits. There is a much greater expectation of privacy in such a lifestyle than there is in large bays holding large numbers of individuals and having no walls or barriers between bunks and lockers. While there still is no reasonable expectation of privacy from all intrusions where command responsibility dictates otherwise, in other circumstances substantial expectations do arise from these living conditions.

United States v. Thatcher, 28 M.J. 20, 24 n.3 (C.M.A. 1989). Finally, the CAAF has adopted the premise that "[w]hile the physical trappings of a modern barracks or military dormitory may be more comfortable and private than an open bay barracks, the need for discipline and readiness has not changed." *United States v. McCarthy*, 38 M.J. 398, 403 (C.M.A. 1993).

In *McCarthy*, the CAAF did not address the "outer limits of appellant's expectation of privacy", but did shape the parameters of a soldier's reasonable expectation of privacy by upholding a warrantless arrest of an individual in a barracks room. *Id.* "[A] barracks/dormitory room does not provide the same sanctuary as the threshold of a private home" and a soldier cannot "reasonably expect to avoid apprehension . . . by retreating to his room." *Id.* at 403. The *McCarthy* decision was grounded in the inherent authority of commanders over the movement of all soldiers subject to their orders, to include those individuals not living in the barracks but residing in a private residence.[8]

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[8]For example, a commander can order a service member to do the following: move into the barracks, stay away from on-base family quarters, and come out of his off-base quarters and report for duty. *McCarthy*, 38 M.J. at 403.

The CAAF has fashioned a subtle but distinct difference in the Fourth Amendment rights of soldiers regarding their apprehension as opposed to the reasonable expectation of privacy in personal items, effects, and conduct of affairs within the barracks room itself. Indeed, the *McCarthy* Court declined to apply the requirements for an arrest warrant set forth in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980), because the Rule for Courts-Martial 302(e)(2) exempts barracks rooms from the requirement for a warrant to effect an apprehension in the military. *McCarthy* does not stand for the proposition that no reasonable expectation of privacy exists in the barracks. *See Curry*, 46 M.J. 733. Rather, a somewhat reduced expectation of privacy exists in the barracks. It is the scope of this expectation of privacy that has yet to be elucidated.

II. MILITARY RULE OF EVIDENCE 313(b) [INSPECTIONS IN THE ARMED FORCES] IS UNCONSTITUTIONAL BECAUSE IT "LAWFULLY" ALLOWS A SEARCH FOR CRIMINAL EVIDENCE TO BE A PURPOSE OF AN INSPECTION.

Military Rule of Evidence 313 allows the admission at trial of evidence obtained from inspections in the armed forces when the evidence is relevant and not otherwise inadmissible. To be clear, petitioner does not contest the admissibility of evidence obtained as a result of a lawful administrative inspection. The constitutional problem lies in Subsection (b) of the Rule, which states in pertinent part:

> (b) *Inspections.* An "inspection" is an examination of the whole or part of a unit . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit . . . An inspection also includes an examination to

> locate and confiscate unlawful weapons and other contraband. . . An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule.

The examination of Private Jackson's barracks room violated the Fourth Amendment because it was a search for criminal evidence conducted without probable cause, and no exception to the Fourth Amendment applies. The administrative inspection exception to the Fourth Amendment is inapplicable because Mil.R.Evid. 313(b) does not pass constitutional muster as contemplated by this Court's precedents in the area of administrative inspections. By its terms Mil.R.Evid. 313(b) allows *one* purpose of an inspection to be the obtaining of evidence for use in a trial by court-martial or in other disciplinary proceedings so long as it is not the *primary* purpose of the examination.

Captain Lamport, the petitioner's commander, concluded, after consulting with the battalion's legal adviser, that the information he had regarding criminal activity was not sufficiently reliable to authorize a probable cause search of petitioner's room. Therefore, he immediately decided to conduct an administrative inspection. The military judge at trial concluded the evidence was admissible under Mil.R.Evid. 313(b) because Captain Lamport did have unit readiness as his *primary* purpose, even though Captain Lamport testified that he fully intended to use any criminal evidence obtained in a trial by court-martial or in other disciplinary proceedings.

Under Mil.R.Evid. 313(b),

> If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was

> directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule.

This provision permits the use of items seized by a commander, so long as the government shows "by clear and convincing evidence" that the primary purpose of the action is to inspect. The constitutional problem is that commanders may lawfully have a search for criminal evidence as one of their purposes for an inspection, so long as it is the secondary purpose and not the first. Consequently, military commanders who desire to search a service member's barracks room for evidence to be used in a criminal prosecution need never articulate probable cause so long as they state that the primary purpose of the examination is unit readiness, health, or welfare.[9]

In *New York v. Burger,* 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed. 2d 601 (1987), this Court reaffirmed that administrative inspections are within the purview of the Fourth Amendment. This Court held in *Burger* that a New York statute authorizing warrantless inspections of vehicle dismantling businesses came within the exception to the warrant requirement for

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[9]See *United States v. Jackson,* 48 M.J. 292, 297 (1998) (Gierke, J., dissenting) ("Clearly, there will be no need to establish probable cause and obtain authorization for a search if the same thing can be accomplished by conducting an "inspection." The commander will need only to invoke his concern for unit readiness to bypass the requirement for probable cause.")

administrative inspections in closely regulated businesses. This Court reasoned that a business owner's expectation of privacy in commercial property is less than similar expectations in an individual's home. Nevertheless, in *Burger,* this Court set forth several criteria to determine the constitutionality of an administrative inspection.

Military Rule Evidence 313(b) does not pass constitutional muster under *Burger* because it does not meet the criterion of restricting the scope of an administrative inspection. As this Court stated, the "time, place, and scope" of an inspection must be limited, in order to place appropriate restraints upon the discretion of the inspecting officers. *United States v. Biswell,* 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed. 2d 87 (1972); see *Donovan v. Dewey,* 452 U.S. 594, 605, 101 S.Ct. 2534, 69 L.Ed. 2d 262 (1981) (exempting inspections of the mining industry from the warrant requirement).

In *Dewey,* 452 U.S. 594 at 600, this Court followed its decisions in *Biswell,* 406 U.S. 311 and *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 790 S.Ct. 774, 25 L.Ed. 2d 60 (1970), and noted that:

> These decisions make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

This Court continued, however, by noting that where a particular Act fails to tailor the scope and frequency of the inspection to specific commercial concerns, the dangers of

unbridled discretion require issuance of a warrant. See, *e.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed. 2d 305 (1978) .

Mil.R.Evid. 313(b) is not specific enough to meet the *Dewey* rationale.[10] Under Mil.R.Evid. 313(b) there are no constitutionally adequate restraints upon the discretion of military commanders. The Rule does not contain a restriction as to the scope of the commander's examination. A search for criminal evidence to be used in a trial by court-martial or in other disciplinary proceedings is lawfully within the scope of a commander's examination under the Rule because the "primary purpose" language of the Rule allows it.

Because Mil.R.Evid. 313(b) is not a narrowly defined statute, military commanders get to define the scope of their examinations themselves. By contrast, in *Burger*, the permissible scope of the searches was narrowly defined by the New York statute to restrict the inspectors to examining the records and any vehicles or parts of vehicles which were subject to the record keeping requirements of the statute and which were on the premises. Clearly, the inspectors did not have the unlimited discretion that military commanders enjoy. Moreover, unlike the officers in *Burger* who were allowed to conduct inspections only "during [the] regular and usual business hours", military commanders may conduct inspections at anytime and there are no place limits to a commander's examination, to include a service member's personal effects. Narrow, nondiscretionary, automatic

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[10]*But see* Stephen A. Saltzburg, et al., *Military Rules of Evidence Manual* 353 (4th ed. 1997) ("Rule 313 should be specific enough to meet the *Dewey* rationale. *Even so,* the practice of preparing local standard operating procedures seems prudent. These more detailed guidelines need not indicate when inspections will occur *but should include guidance on the general manner, frequency, and procedures of the inspections.*") (emphasis added).

procedures are essential elements of those administrative inspections that pass constitutional muster. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed 2d 685 (1989).

Mil.R.Evid. 313(b) does not meet the constitutional requirements set forth in *Burger* and other administrative inspection precedents established by this Honorable Court. Such requirements are vital to preserving the Fourth Amendment rights of our service members.

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment of the United States Court of Appeals for the Armed Forces.

Respectfully submitted,

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December 1998

APPENDIX A

UNITED STATES, Appellee

v.

Antonio JACKSON, Private
U.S. Army, Appellant

No. 96-1402

Crim. App. No. 9401052

United States Court of Appeals for the Armed Forces

Argued November 6, 1997

Decided September 2, 1998

Counsel

For Appellant: *Captain Stephen P. Bell, Jr.* (argued); *Colonel John T. Phelps, II, Lieutenant Colonel Michael L. Walters,* and *Captain Michael E. Hatch* (on brief).

For Appellee: *Lieutenant Colonel Frederic L. Borch, III* (argued); *Colonel Joseph E. Ross* and *Captain Elizabeth N. Porras* (on brief); *Captain Joanne P. Tetreault.*

Military Judges: Buris C. Dale and Robert F. Holland

Opinion of the Court

EFFRON, Judge:

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of wrongful possession of marijuana with intent to distribute and

unlawfully carrying a concealed weapon, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 USC §§ 912a and 934, respectively. He was sentenced to a bad-conduct discharge, confinement for 4 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Court of Criminal Appeals affirmed in an unpublished opinion.

We granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED WHEN HE RULED THAT THE GOVERNMENT HAD PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT THE SEARCH OF APPELLANT'S BARRACKS ROOM WAS A VALID HEALTH AND WELFARE INSPECTION AND THAT THE SEARCH WAS LAWFUL BECAUSE APPELLANT HAD NO REASONABLE EXPECTATION OF PRIVACY IN HIS BARRACKS ROOM.

We hold that the military judge did not err in finding that the search was a valid health and welfare inspection within the meaning of Mil.R.Evid. 313(b), Manual for Courts-Martial, United States (1995 ed.).

I. BACKGROUND

A fundamental precept of military leadership is that commanding officers are accountable for the training, readiness, and performance of their units. The President, in furtherance of this vital principle of command responsibility, has authorized commanding officers to conduct inspections of their units — "as an incident of command" — when "the primary purpose . . . is to determine and to ensure the security, military fitness, or good order and discipline of the unit . . . . ." Mil.R.Evid. 313(b).

In *United States v. Middleton*, 10 MJ 123 (1981), our Court unanimously sustained the authority of commanders to conduct unit inspections. We noted that "such inspections are time-honored and go back to the earliest days of the organized militia." We observed that "the inspection has traditionally been a 'tool' for a commander to use in insuring the overall fitness of [his] unit to perform its military mission."' *Id.* at 127 (citations and footnote omitted). After noting that the services "have made increasing efforts to provide privacy for servicemembers in their dormitories and barracks," *id.* at 128 n.8, we emphasized that," [w]hile the living conditions of the modern serviceperson may be more comfortable — and, indeed, more private — than those known by their fathers, still the basic purpose for existence of the military has not altered; and neither has the need for the tool of inspection to insure the readiness of the individual serviceperson and of his unit to respond to an emergency." *Id.* at 128 (footnote omitted).

With respect to the expectations of privacy under the Fourth Amendment, we concluded that, "during a traditional military inspection, no serviceperson whose area is subject to the inspection may reasonably expect any privacy which will be protected from the inspection." *Id.* at 128. At the same time, we noted that an inspection might not be sustained if its character changed during the process or if the circumstances were unreasonable. *Id.* at nn. 9 and 10. The President has implemented this concern in Mil.R.Evid. 313(b) by providing that the "primary purpose" of an inspection cannot be to "obtain[] evidence for use in a trial by court-martial." However, the Rule expressly permits use of the fruits of an inspection in a disciplinary proceeding, so long as the primary purpose is "to determine and to ensure the security, military fitness, or good order and discipline of the unit[.]"

Mil.R.Evid. 313(b) makes clear that it is reasonable for an inspection to include "an examination to locate and confiscate unlawful weapons and other contraband" and permits such an examination, even if it "was directed immediately following a report of a specific offense in the unit . . . and was not previously scheduled[.]" In order to meet the primary purpose test in such a case, the Government must "prove by clear and convincing evidence" that the examination met the criteria for an inspection with regard to its military purpose.

Mil.R.Evid. 313(b) specifically recognizes that there is no need for an inspection to be preplanned or randomly scheduled. The inquiry under Mil.R.Evid. 313(b) focuses on whether the "primary purpose" of the inspection was "to determine and to ensure the security, military fitness, or good order and discipline of the unit." *See also United States v. Taylor,* 41 MJ 168, 172 (CMA 1994) ("principal focus" is on the role of the commander); *United States v. Gardner,* 41 MJ 189, 191 (CMA 1994) ("litmus test is whether the examination is made primarily for administrative purposes or instead for obtaining incriminating evidence"); S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 342 (4th ed. 1997).

So long as the primary purpose of the examination is "unit readiness" and not disciplinary proceedings, it is permissible both: (1) for an inspection to take place after the commander receives specific information about the presence of contraband; and (2) for an inspection for weapons or contraband to result in disciplinary proceedings.

II. FACTS

On January 26, 1994, appellant's unit commander, Captain (CPT) Lamport, was informed by Criminal

Investigation Command (CID) Special Agent (SA) Foster that an anonymous female friend of appellant had reported that she had witnessed appellant selling drugs in his barracks room the previous evening. The woman also had said that appellant hid the drugs in a stereo speaker in his room.

This information raised two separate concerns. First, that a member of CPT Lamport's unit might have committed a crime in the barracks. Second, that as a result of this activity, illegal drugs may have been distributed to others within the barracks, thereby undermining the military readiness of the unit. Although CPT Lamport — after consulting with the battalion's legal adviser — concluded that the information was not sufficiently reliable to authorize a probable cause search of appellant's room under Mil.R.Evid. 314, he determined that the information about distribution of drugs in the barracks was sufficient to raise concerns about the readiness of the unit.

As a result of these concerns, CPT Lamport ordered a health and welfare inspection "to find out on a whole what the unit was like for drugs and if anybody else had been using" drugs. CPT Lamport contacted the local canine unit, had a dog handler prove the reliability of the dog's drug-sniffing capability, and posted non-commissioned officers (NCOs) as guards at all entrances and exits to prevent the removal of evidence. All 36 barracks rooms assigned to members of CPT Lamport's unit were inspected, and CPT Lamport told the inspector to "look at every room" and not to focus on any particular room.

The health and welfare inspection took place about "an hour to an hour and a half after" SA Foster told CPT Lamport about the anonymous tip. The inspection was carried out by two canine units (dogs and handlers), SA Foster (accompanying the canine team chief), and "numerous NCOs."

After one of the drug dogs alerted in appellant's room, SA Foster, who was standing by in case any drugs were found, entered the room to help the canine team. The dog handler opened a stereo speaker and discovered a small bag, which he suspected contained marijuana. SA Foster conducted a field test of the substance and confirmed that it was marijuana. The record does not reflect whether SA Foster departed the barracks after he seized the marijuana or remained with the canine team until the examination of all 36 rooms was completed.

III. DISCUSSION

At trial, the defense moved to suppress the fruits of the inspection on the ground that it was an illegal search. The Government offered the testimony of CPT Lamport, who stated that after learning that appellant was involved in distribution of drugs and was hiding drugs in his barracks room, he decided to conduct a health and welfare inspection "to find out if there were drugs in the barracks and if anybody else had been using" drugs. He stated that his "primary motivation" for ordering the inspection was "unit readiness and also to find out on a whole what the unit was like for drugs . . . . If there was any contraband in the rooms or anything else." In ruling on the motion to suppress, the military judge found that the primary purpose of the examination was to ensure "unit readiness."

We previously have held that a military judge's finding regarding the "primary purpose" of an inspection is a question of fact, which will be sustained on appeal unless clearly erroneous. *United States v. Shover*, 45 MJ 119, 122 (1996). Regardless whether this is a question of fact or a mixed question of fact and law, we agree that the Government met its burden in demonstrating that the primary purpose of the inspection was to insure unit readiness.

Physical and mental fitness are the quintessential requirements of military readiness. The use of illegal drugs significantly diminishes the user's physical and mental capabilities. Any commander who ignores the potential presence of illegal drugs in the unit does so in disregard of his or her responsibility and accountability for the readiness of that unit. Regardless whether the information in this case was sufficient to establish probable cause for a search of appellant's room, it was more than adequate to provide CPT Lamport with a reasonable basis to assess the health and welfare of his unit.

The validity of the inspection is not affected by CPT Lamport's forthright testimony that he considered at the time that any contraband uncovered in the inspection could be used in an Article 15,[1] non-judicial punishment or court-martial proceeding. Mil.R.Evid. 313(b) expressly permits use of the results of a lawful inspection in such proceedings, and any other answer from CPT Lamport would have reflected either an ignorance of the law or a lack of candor. There is no evidence, however, that the inspection was "a pretext or subterfuge for an otherwise illegal search." *Gardner, supra* at 191. Appellant's prosecution "was merely incidental punitive action ancillary to an otherwise justifiable inspection." *Id.* at 192. Contrary to appellant's suggestion, there is no evidence that he "was specifically targeted after his command received an anonymous tip that he was selling drugs." Final Brief at 11; *compare United States v. Turner,* 33 MJ 40, 42 (CMA 1991) ("no evidence tending to show" that the purpose of the urinalysis was other than unit readiness), *with United States v. Campbell,* 41 MJ 177, 183 (CMA 1994) (test based on "suspicion of criminal activity"), and *United States v.*

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[1]Uniform Code of Military Justice, 10 USC § 815.

Thatcher, 28 MJ 20, 25 (CMA 1989) (appellant was the "prime suspect" in the theft).

We reject the suggestion that the presence of drug detector dogs and the CID agent indicates that this was not a valid unit inspection. Mil.R.Evid. 313(b) expressly permits an inspection to detect weapons and contraband. If the commander's primary purpose is "unit readiness," the commander is not prohibited from engaging expert assistance in structuring or conducting the inspection and ensuring proper disposition of any weapons or contraband located during the inspection. Likewise, the commander is not prohibited from taking steps to ensure that weapons and contraband are not removed during the inspection. Insofar as Mil.R.Evid. 313(b) permits inspections for weapons and contraband and mixed-use examinations (*e.g.,* unit readiness as the primary purpose and criminal prosecution as a secondary purpose), use of the expertise of law enforcement personnel in dealing with weapons and contraband is appropriate. *Cf. Middleton, supra* at 129.

Whether the Government can meet the clear-and-convincing standard will depend on the facts and circumstances of the case, including the nature of the contraband. Given the oft-cited adverse impact of drugs on unit readiness, it is permissible for the military judge to take into account the nature of the contraband in determining that the threat to unit readiness, rather than the criminal prosecution of an individual, was the primary purpose for a unit inspection. *See United States v. Bickel,* 30 MJ 277, 280 (CMA 1990) (drug use "harms the military mission," "diminishes the military effectiveness," and "may endanger" other persons and property); *Middleton, supra* at 129 n. 11; *cf. Shover, supra* at 120, 122; *Gardner, supra* at 192.

We hold that the Government demonstrated, through CPT Lamport's testimony, that the "primary purpose" of the

search was "unit readiness." We conclude, therefore, that the search of appellant's barracks room was a valid health and welfare inspection within the meaning of Mil.R.Evid. 313(b).[2] Based on the demonstrated reliability of the drug dog's ability, once the dog alerted at appellant's stereo speaker, SA Foster had probable cause to open the speaker, where he discovered

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[2]We reject the suggestion in the dissent that the majority opinion "removes any expectation of privacy for soldiers living in a barracks, eliminates any meaningful distinction between a search and an inspection, . . . renders Mil.R.Evid. 315 (probable-cause searches) meaningless and unnecessary[, and] removes the protection of privacy rights that were . . . conferred by the President in Mil.R.Evid. 313(b)." — MJ (*1*). To paraphrase Mark Twain, the report of the demise of the rules concerning privacy of service-members has been greatly exaggerated. *The Oxford Dictionary of Quotations* 706 (4th ed. 1992).

Our opinion is grounded in Mil.R.Evid. 313(b), which was promulgated by the President and which permits inspections for weapons and contraband following a report of an offense under specified circumstances. Nothing in our opinion permits such inspections to be used to bypass the requirement for probable cause to search for weapons or contraband under circumstances that would not be permitted by Mil.R.Evid. 313(b); nor does our opinion apply to evidence other than weapons or contraband.

Contrary to the suggestion in the dissent that, under the majority opinion, a commander need only "invoke his concern for unit readiness to bypass the requirement for probable cause," — MJ (*1*), we do not hold or imply that a commander can simply incant magic words to justify an inspection for weapons or contraband. Our opinion notes that whether the Government can meet the "clear and convincing" standard of Mil.R.Evid. 313(b) to justify an inspection for weapons or contraband depends on the specific facts and circumstances of the case, including the nature of the contraband. — MJ (9). In the present case, the commander was provided with information indicating an ongoing problem of illegal drug distribution in the barracks. The commander testified as to the nature of the information and the potential impact on the unit. Under such circumstances, the military judge was well within his authority to find that the Government had presented clear and convincing evidence that the commander's primary purpose for the inspection was unit readiness.

the marijuana. *See United States v. Place,* 462 U.S. 696, 707 (1983); *United States v. Alexander,* 34 MJ 121, 125 (CMA 1992); *Middleton, supra* at 134-35.

IV. DECISION

The decision of the United States Army Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges SULLIVAN and CRAWFORD concur.

GIERKE, J. (dissenting):

In my view the majority opinion removes any expectation of privacy for soldiers living in a barracks, eliminates any meaningful distinction between a search and an inspection, and renders Mil.R.Evid. 315, Manual for Courts-Martial, United States (1995 ed.) (probable-cause searches), meaningless and unnecessary. It likewise removes the protection of privacy rights that were, in my opinion, conferred by the President in Mil.R.Evid. 313(b). The majority opinion results in the anomalous situation where it may be unlawful to invade the privacy of one soldier unless the privacy of 100 others is invaded at the same time.

Clearly, there will be no need to establish probable cause and obtain authorization for a search if the same thing can be accomplished by conducting an "inspection." The commander will need only to invoke his concern for unit readiness to bypass the requirement for probable cause.

Drugs are illegal because they are detrimental to unit readiness. *See United States v. Middleton,* 10 MJ 123, 129 n. 11 (CMA 1981); *see also United States v. Shover,* 45 MJ 119, 123 (1996) (Sullivan, J., dissenting) ("A commander's intent to prosecute is logically consistent with, and in military parlance practically indistinguishable from, an intent to maintain the security, military fitness, or good order and

discipline of his unit."). Indeed, before enactment of Article 112a,[1] drug offenses were prosecuted under Article 134[2] as offenses prejudicial to good order and discipline. *See* para. 213a, Manual for Courts-Martial, United States, 1951; *see also United States v. Foster,* 40 MJ 140, 143 (CMA 1994) (violation of an enumerated article of UCMJ "*per se* is either prejudicial to good order and discipline or brings discredit to the armed forces"). Thus, concern about unit discipline and effectiveness tells us little about prosecutorial intent. To conclude that concern for unit readiness obviates the requirement for probable cause is, in my view, faulty reasoning.

Mil.R.Evid. 313(b) places the burden on the prosecution to prove by "clear and convincing evidence" that a previously unscheduled examination for contraband immediately following a report of a specific offense is nonetheless a valid inspection. If the prosecution cannot meet this burden, then the fruits of the purported inspection may not be admitted in evidence. Unfortunately, the majority opinion's analysis stops with CPT Lamport's incantation of the magic words "unit readiness," instead of examining the objective facts surrounding the purported inspection.

In *United States v. Ellis,* 24 MJ 370, 372 (1987), this Court held that a purported inspection may "be transformed into a search requiring probable cause if it was conducted as a subterfuge . . . or was conducted in an unreasonable manner." (Citations and footnote omitted). In such a case, "the servicemember retains an expectation of privacy in the particular property which is intruded upon." *Id.* More recently, in *United States v. Thatcher,* 28 MJ 20, 24 (1989),

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[1]Uniform Code of Military Justice, 10 USC § 912a.

[2]UCMJ, 10 USC § 934.

this Court reinforced *Ellis*, saying, "[I]f an intrusion on privacy is really an 'inspection' and complies with Mil.R.Evid. 313, no reasonable expectation of privacy has been violated; but if the purported inspection is only a subterfuge for a search or is not properly conducted, then a violation has occurred." Thus, if the purported inspection is a subterfuge for a search or is conducted in an unreasonable manner, the Government must demonstrate that there was probable cause to search the area in question.

CPT Lamport did not think there was probable cause in this case and the Government does not argue that there was probable cause to search. Accordingly, the only question before us is whether there was a valid inspection under Mil.R.Evid. 313.

Mil.R.Evid. 313(b) defines an "inspection" as "an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle." Although it is permissible to inspect for weapons or contraband, the drafters of the rule recognized that there is "a strong likelihood of subterfuge" when an inspection for weapons or contraband that was not previously scheduled immediately follows a report of a specific offense. Drafters' Analysis of Mil.R.Evid. 313, Manual, *supra* (1995 ed.) at A22-25. Accordingly, the sixth sentence of Mil.R.Evid. 313(b) provides as follows:

> If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are

> selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule.

While the military judge's finding regarding the commander's primary purpose is a matter of fact, the ultimate question whether an examination is a search or an inspection is a question of law that this Court reviews *de novo*. *United States v. Gardner*, 41 MJ 189, 191 (1994).

In *United States v. Taylor*, 41 MJ 168, 172 (1994), this Court held, in a divided opinion, that the "principal focus" is on the officer ordering the inspection when the question is whether the inspection was a subterfuge search for contraband rather than a lawful administrative inspection. In *Taylor* the unit commander had already decided to order a random urinalysis of his unit but had not decided the order in which sub-elements of his unit would be inspected. An officer and noncommissioned officer in the unit received information that a specific member of the unit was using drugs. They did not convey that information to the unit commander but, instead, they suggested that the section to which the suspected drug user was assigned be inspected first. A majority of the Court concluded that the sixth sentence of Mil.R.Evid. 313(b) was not triggered because the unit commander had not received a "report of a specific offense in.the unit," even though his subordinates had. Two judges dissented in *Taylor* on the ground that the actions of the subordinate officer and noncommissioned officer should have been considered in determining whether a subterfuge search occurred. 41 MJ at 172-75.

In this case, unlike *Taylor*, the sixth sentence of Mil.R.Evid. 313(b) was triggered because the examination

was not previously scheduled and was directed by the unit commander immediately following the tip to SA Foster that appellant was selling drugs from his barracks room. Thus the Government had the burden of proving "by clear and convincing evidence that the examination was an inspection."

A search is not transformed into an inspection merely by labeling it as an inspection. The purpose of the sixth sentence of Mil.R.Evid. 313(b) was to provide "objective criteria by which to measure a subjective standard, *i.e.*, the commander's purpose." Drafters' Analysis of Mil.R.Evid. 313(b), *supra.* Thus we must look at the circumstances, not merely the words used by the commander to describe the examination. While the commander's stated intent is an important factor, it is not a talisman at which legal analysis stops. *See Middleton,* 10 MJ at 131 n. 14 (purpose may be demonstrated not only by statements of commander but by the circumstances).

It is clear from CPT Lamport's testimony that this "inspection" was not preplanned. It was not in response to a perceived unit-wide drug problem. The purported inspection would not have been conducted but for SA Foster's report of an anonymous tip.

The purported inspection targeted appellant's drugs, not drugs in general. The tipster had specifically identified appellant as the person trafficking in marijuana. *See Thatcher,* 28 MJ at 25 (one of persons inspected was "prime suspect"). CPT Lamport consulted with the unit's assigned prosecutor and a criminal investigator before deciding to examine his unit. He was advised that he did not have enough information to constitute probable cause to search but, rather, that he could conduct an inspection. The examination was conducted as soon as CPT Lamport could marshal his noncommissioned officers and the law enforcement units accompanying them, including two canine teams and SA Foster, the same CID agent who had reported information about appellant's

misconduct. Guards were posted to prevent removal of evidence. SA Foster stood by to seize and analyze evidence. There is no evidence in the record that CID agents had been present at previous inspections. There is no evidence that SA Foster remained present after his tipster's information was validated and the drugs seized from appellant's stereo speaker.

Although CPT Lamport used the appropriate words like "health and welfare" and "unit readiness," I do not believe that these words were sufficient, in light of all the surrounding circumstances, to constitute "clear and convincing" evidence that examination of the unit was a valid inspection. CPT Lamport's testimony must be balanced against the timing of the purported inspection, the specificity of the information that triggered the purported inspection, the involvement of prosecutorial and law enforcement authorities, the efforts taken to prevent removal of evidence, the failure of the Government to show that SA Foster's presence extended past the seizure of evidence from appellant's room, and the failure of the Government to show that CID presence during inspections was not unusual.

On this record, I would hold that the Government failed to meet its burden of proof. In so doing, I do not mean in any way to impugn the honest y or integrity of CPT Lamport. He relied on the advice of the unit's legal adviser. I also recognize the need to keep drugs and other contraband out of the unit and the usefulness of health and welfare inspections to accomplish this very important military purpose. It is my view, however, that under the circumstances of this case, the purported inspection was, in fact, a search conducted without probable cause. Accordingly, any evidence seized in that search was inadmissible at appellant's court-martial. I would reverse the decision of the court below.

APPENDIX B

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Before

CAIRNS, TOOMEY, and RUSSELL
Appellate Military Judges

UNITED STATES, Appellee

v.

Private E2 ANTONIO JACKSON, 418-94-0567
United States Army, Appellant

ARMY 9401052

Headquarters, Fort Hood
B.C. Dale, Jr. and R.F. Holland, Military Judges

For Appellant: Lieutenant Colonel John T. Rucker, JA; Captain James W. Friend, JA (on brief); Lieutenant Colonel Michael L. Walters, JA.

For Appellee: Colonel John M. Smith, JA; Lieutenant Colonel Eva M. Novak, JA; Captain Joanne P. Tetreault, JA (on brief).

18 July 1996

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

/s/ Williams S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

APPENDIX C

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES,
Appellee

v.

Antonio
JACKSON (418-94-0567),
Appellant

USCA Dkt. No. 96-1402/AR
Crim. App. No. 9401052

JUDGMENT

MANDATE
Pursuant to Court Rule 43A

ISSUED: 9/18/98

By: Kenneth A. Albert

OPINION ATTACHED

This cause was heard by the Court on appeal from the United States Army Court of Criminal Appeals and was argued by counsel on November 6, 1997. On consideration thereof, it is by the Court, this 2nd day of September, 1998,

ORDERED and ADJUDGED:

That the decision of the United States Army Court of Criminal Appeals is hereby affirmed in accordance with the opinion filed herein this date.

For the Court

/s/ Thomas F. Granahan
Clerk of the Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

CERTIFIED TO BE A TRUE COPY
OF THE JUDGMENT

Thomas F. Granahan
Thomas F. Granahan
CLERK

Date: 18 SEP 1998

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